BRIEF ARGUMENT SUPPORTING PETITION

The petition for writ of habeas corpus alleged a cause for granting of the writ and the discharge of Rea from custody of the respondent.

A

There was a violation of petitioner's right to a judicial trial in the sentencing court by its refusal to permit petitioner to challenge the legality of the orders supporting the indictment contrary to the Fifth and Sixth Amendments to, and the bill of attainder clause of, the Constitution, which may be collaterally considered by a writ of habeas corpus, making it reversible error for the district court to deny the writ without hearing evidence on the petition.

Inasmuch as denial to one charged by indictment with the offense of refusal to submit to induction, after completing the screening process prescribed by the army whereby he is accepted by the armed forces for training and service, of his right to challenge the validity of the administrative order supporting the indictment, has been already so thoroughly argued at length, both orally and in writing, by counsel, it will be an undue burdening of the court to repeat such argument here. Petitioner asserts that the denial of such defense against the indictment violated his rights to due process, judicial trial, and right of trial by jury, contrary to Article III and the Fifth and Sixth Amendments to the Constitution. (See Joint Brief for Petitioners in *Smith* v. *United States,* No. 66 Oct. T. 1945, and *Estep* v. *United States,* No. 292 Oct. T. 1945, pages 85-95.) Moreover, petitioner claims that the denial of his rights to show, in response to the indictment, that the administrative order was invalid, is prohibited by Article I, Section 9, clause 3, of the Constitution. *Ibid.,* pp. 95-105.

Upon presentation of a petition for a writ of habeas corpus it is the duty of a district court to inquire "into the cause of restraint of liberty". (28 U. S. C. 452) It is the duty of the court to "dispose of the party as law and justice requires" after a hearing of the writ of habeas corpus. (28 U. S. C. 461) The truth and substance of the causes of detention must be inquired into by the court. (*Frank* v. *Mangum,* 237 U. S. 309, 331) The inquiry upon the hearing of a petition for a writ of habeas corpus has been expanded and liberalized by the implementing statutes. *Hawk* v. *Olson,* 66 S. Ct. 116, 118; *Walker* v. *Johnston,* 312 U. S. 275, 285; *Smith* v. *O'Grady,* 312 U. S. 329.*

While ordinarily a judgment and commitment under which a prisoner is detained is impervious to collateral attack on habeas corpus, if during the trial under an indictment the prisoner's constitutional rights were so far denied him, the sentencing court loses jurisdiction so as to permit full inquiry upon the petition for writ of habeas corpus. *Bowen* v. *Johnson,* 306 U. S. 19, 24; *Frank* v. *Mangum,* 237 U. S. 331, 335, 347; *Moore* v. *Dempsey,* 261 U. S. 86, 91; *Johnson* v. *Zerbst,* 304 U. S. 458, 468; *Walker* v.

*Mr. Justice Stone exhaustively reviews the history, law and constitutional provisions on the subject in *McNally* v. *Hill,* 293 U. S. 131, 135-139, to which reference is here made. See also Holdsworth, *History of the English Law,* vol. 9, pp. 108-125; *Encyclopædia Britannica,* 1942, Vol. 11, p. 53; *The Encyclopedia Americana,* 1942, Vol. 13, pp. 602-604; Cooley, *Constitutional Limitations,* 8th ed., vol. 1, pp. 709-728; *Watson on the Constitution,* Vol. 1, pp. 721-733; *Kent's Commentaries,* 12th ed. (Holmes), Vol. 2, pp. 32-42; *In re Rosier,* 76 U. S. App. 214, 133 F. 2d 316, 322-324. Cf. *Dorsey* v. *Gill,* 148 F. 2d 857, with which consider *Jones* v. *Huff,* decided by the United States Court of Appeals for the District of Columbia on November 26, 1945 (14 Law Week 2335-2336), holding that the trial court erred in dismissing a petition for writ of habeas corpus on the ground that the alleged denial of due process by the trial judge upon the trial was preposterous, unbelievable and insufficient so as not to require a hearing.

Johnston, 312 U. S. 275, 286; *Waley* v. *Johnston,* 316 U. S. 101, 104; *House* v. *Mayo,* 324 U. S. 42.*

It is clear that the petitioner strongly overcame the presumption of irregularity of the trial and proceedings under the indictment. If the trial court had permitted a hearing of evidence upon a writ of habeas corpus, petitioner would have established by testimony all the allegations of the petition, showing that the administrative orders, the indictment, the judgment and commitment were void and that the district court lost jurisdiction through gross violation of his constitutional rights. It was especially harmful for the trial court to hold, in the face of the pleadings, that petitioner waived his right to challenge the invalidity of the proceedings before the sentencing court, because of his failure to assert there his constitutional objections. The pleadings do not show that he failed to raise his constitutional objections upon the trial of the indictment. The trial court improperly indulged in intendments against the petition and read into it matters which had not been alleged and which could not fairly be inferred from the allegations in the petition. Moreover, the trial judge illegally scrutinized the petition with a technical nicety. (*Holiday* v. *Johnson,* 313 U. S. 342, 350) He should have permitted the petitioner an opportunity to offer evidence as to the pleadings upon the trial of the indictment, in order to show the truth as to what actually took place upon the trial of the indictment. The petitioner could not plead all the evidence and the entire record made before the sentencing court. Indeed, he requested the court to issue a subpoena duces tecum and a writ of certiorari to the clerk of the district court at Oklahoma City in order to prove by the record the proceedings had upon the trial

*See also *Smith* v. *O'Grady,* 312 U. S. 329, 333; *Williams* v. *Kaiser,* 323 U. S. 471, 472; *Tompkins* v. *Missouri,* 323 U. S. 485; *Cochran* v. *Kansas,* 316 U. S. 255; *Powell* v. *Alabama,* 287 U. S. 52, 58; Holtzoff, "Collateral Review of Convictions in Federal Court," Boston Univ. L. Rev., January 1945, Vol. XXV, No. 1.

of the indictment. [14] Petitioner was ready and willing to discharge the burden that the law imposed upon him, in making a collateral attack on the judgment and commitment whereby he was restrained of his liberty. It is true that he "must prove his allegations, but he is entitled to an opportunity." *Hawk* v. *Olson*, 66 S. Ct. 116, 120.*

In *House* v. *Mayo*, 324 U. S. 42, 65 S. Ct. 517, the district court denied a petition for writ of habeas corpus without calling for a return and without a hearing, which is the same action taken by the district judge in this case. In the *House* case the "district judge did not consider whether this deprivation of constitutional right is remediable in a federal habeas corpus proceeding". (65 S. Ct., at page 519) Moreover, in the *House* case, as here, the district judge was of the opinion that the prisoner "has had a full, complete and competent consideration and decision in the Supreme Court of Florida of all the various matters here sought again to be presented." In the *House* case the Supreme Court of Florida did exactly as it is alleged that the District Court of the Western District of Oklahoma did concerning Rea's claim that the administrative action was void, that is to say, the court without considering the merits of Rea's "contentions and without affording a hearing on the merits, denied relief to petitioner, on the ground that the particular remedy sought was not the appropriate one under Florida law to raise those contentions." Since the trial court in the case at bar did not decide whether the constitutional rights of Rea had been denied by the district court and the draft boards but denied the petition on the grounds that it was an attempt to re-try the same issues raised and considered by the district court in the Western District of Oklahoma, the decision of the court below is "thus not supported by the grounds assigned for it, and should" be reversed by this court (*House* v. *Mayo*, 65 S. Ct., at page 521.)

*House v. Mayo, 324 U. S. 42.

Moreover it should be observed that the holding of the district court that the questions urged in the petition had been fully considered and fairly determined against Rea in the trial under the indictment in the District Court of the Western District of Oklahoma is inconsistent with the statement of the trial court in the same order that Rea had failed to raise any constitutional question during said trial under the indictment. The latter statement of the trial court is palpable error. It is a violent assumption of fact that is not supported by any inference that may be drawn from the petition. The statement should be disregarded as wholly unsupported by the record.

Even assuming *arguendo* that Rea had waived these objections in the district court at the trial under the indictment by failure to complain of the action of that court, yet he would not be precluded from raising constitutional questions upon his petition for writ of habeas corpus. Since the constitutional objections urged in the petition are so fundamental and of such great magnitude they cannot be waived by failure to object even if Rea was represented by counsel. If the questions are such that they can be considered on a petition for writ of habeas corpus they cannot be waived because of failure to object at the trial. *Screws* v. *United States,* 325 U. S. 91, 65 S. Ct. 1031, 1038.

Thus the failure to object to the excessive sentence in the case of In re *Bonner,* 151 U. S. 242, 257; to the deliberate use of perjured testimony in *Mooney* v. *Holohan,* 294 U. S. 103, 112-113; to the mob domination of a trial in *Moore* v. *Dempsey,* 261 U. S. 86, 91; to the denial of counsel in *Johnson* v. *Zerbst,* 304 U. S. 458, 468; and to the refusal to communicate with counsel in *House* v. *Mayo,* 65 S. Ct. 517, did not preclude the court from considering the merit of the various questions upon the petition for writ of habeas corpus.

The decisions in *United States* ex rel. *Lohrberg* v. *Nicholson* (CCA-4) 141 F. 2d 689, certiorari denied 322

U. S. 744, *United States* ex rel. *Falbo* v. *Kennedy* (CCA-4) 141 F. 2d 689, certiorari denied 322 U. S. 745, and *United States* ex rel. *Arpaia* v. *Alexander* (CCA-2) 146 F. 2d 847, are not apposite. In each of those cases the prisoner had not completed the selective process. The failure of each to report for induction prevented the armed forces from determining whether he was acceptable for training and service through the screening process. None of those registrants had reached the point in the administrative process which qualified them to challenge the legality of the administrative orders. Since Rea had completed the selective process upon reporting for induction he was in a position to challenge the administrative orders in defense against the indictment charging him with refusal to submit to induction. The denial of this right entitled him to the writ of habeas corpus.

Similarly in *Waley* v. *Johnston*, 316 U. S. 101, the court extended the writ and broadened its scope so as to permit a full inquiry into facts entirely *de hors* the record to show the illegality of a plea of guilty, thus placing the plea on the same footing as a confession obtained in the same manner by force and duress. It was said: "In such circumstances the use of the writ in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it. It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights." (Pp. 104-105)

However, since the statement of the trial court that Rea waived the constitutional questions by failure to raise them at his trial is not supported by the record in this case it is not necessary for this court to decide the question of waiver. Indeed, the petitioner intends to show by evidence upon a hearing of his petition for writ of habeas corpus

that he did not waive any rights on his trial of the indictment and that he did not fail to object to the unconstitutional action of the district court in denying him his rights to challenge the validity of the administrative action in defense to the indictment.

The petition for the writ of habeas corpus in this case is not a substitute for an appeal. The questions urged are not such questions that can be raised only upon appeal. The fundamental objections are such that they can be considered at any time and in a collateral proceeding. The objections urged vitiate the entire proceeding and oust the convicting court of jurisdiction so as to make the sentence subject to collateral attack.

B

There was a denial of petitioner's right to exemption from all training and service by the administrative agency contrary to the Act, the Regulations and the due process clause of the Fifth Amendment to the Constitution, which invalidated the indictment, giving no support to the judgment committing petitioner, so as to deprive the convicting court of jurisdiction to sentence petitioner under the Act.

The petition for writ of habeas corpus alleged that the Government had no authority to institute and prosecute the delinquency proceedings against petitioner under the Act because of the illegality of the administrative orders. [1-15] The petition alleged facts bringing petitioner within the scope of the term "minister of religion" appearing in Section 5 (d) of the Act and in the Regulations. (See Joint Brief for Petitioners in the *Smith* and *Estep* cases, Nos. 66 and 292, respectively, October Term 1945, pages 108-109, 131-194.) Moreover, it is apparent that allegations showed that petitioner was exempt from training and service under the Act and Regulations as construed by the opinions of the Selective Service System. (See Appendix to the Joint

Brief for Petitioners in the *Smith* and *Estep* cases, supra, pages 28a-57a, 71a-73a.)

The petition for writ of habeas corpus alleged facts showing the illegality of the administrative action, thus bringing petitioner under the rule laid down in *Hull* v. *Stalter* (CCA-7) 151 F. 2d 633, decided November 6, 1945. In that decision it was held, upon facts weaker than those alleged in the case at bar, that Hull, one of Jehovah's witnesses, had been denied due process of law contrary to the Fifth Amendment to the Constitution by the draft boards' denying him the exemption he claimed from training and service as a minister of religion. Concerning Jehovah's witnesses the court in that decision said: "The fact is, they have been recognized by the Selective Service System as a religious organization and are entitled to the same treatment as the members of any other religious organization. . . . Also, a registrant's classification should be determined by the realities of the situation, not merely by what he professes. . . . he is entitled to such exemption if his work brings him within that classification." Inasmuch as the denial of due process in that case was held to be sufficient to establish the illegal restraint of Hull by a director of a CPS camp, by force of the same reason the same illegal action by the administrative agency in this case should prove the illegal restraint of Rea by the warden of the federal correctional institution. Both civil officers claimed custody authority which emanated from the same source, to wit, the Selective Service System.

The holding in *Falbo* v. *United States,* 320 U. S. 549, does not preclude judicial inquiry of the illegal administrative action here asserted. That decision is confined exclusively to the denial of judicial review of such orders to a registrant who has failed to complete the selective process. Judicial review by the Constitutional writ of habeas corpus has been expanded by the Act of Congress. The writ comes in from the outside of delinquency proceedings under the

draft act and goes behind them to inquire into the substance of the cause of restraint and determine "whether they have been more than an empty shell." (*Frank* v. *Mangum*, 237 U. S. 309 at 345, HOLMES, J.)

Neither Congress nor the Constitution imposes any restrictions or conditions as to the time of the illegal restraints precedent to review upon the writ of habeas corpus. Moreover they do not inflict any penalties against the person unlawfully imprisoned by suspending the writ until he has satisfied the ultimate demands of the administrative agency causing the restraint. The prisoner is entitled to a hearing upon the writ at any time when it is shown that he is detained either "by color of the authority of the United States", or "is in custody for an act done or omitted in pursuance of a law of the United States", or "is in custody in violation of the constitution . . . of the United States". (28 U. S. C. Sec. 453) It should be noticed that failure to submit to induction under the Act and Regulations is "an act . . . omitted in pursuance of a law of the United States" within the meaning of the Code.

It has never been questioned that a federal court can by habeas corpus inquire into the legality of the restraint of one imprisoned by a court-martial order. If the court finds that the armed forces do not have jurisdiction because of the failure of the prisoner to be enlisted properly, or refusal to submit to induction, or illegality of the administrative action that forced the prisoner into the armed forces, the petitioner will be discharged from custody. *Ex parte Reed*, 100 U. S. 13; In re *Grimley*, 137 U. S. 147; In re *Morrissey*, 137 U. S. 157; *Johnson* v. *Sayre*, 158 U. S. 109; *Billings* v. *Truesdell*, 321 U. S. 542; *United States* ex rel. *Phillips* v. *Downer* (CCA-2) 135 F. 2d 521; *United States* ex rel. *Trainin* v. *Cain* (CCA-2) 144 F. 2d 944; *United States* ex rel. *Beye* v. *Downer* (CCA-2) 143 F. 2d 125.

In *Ver Mehren* v. *Sirmyer* (CCA-8) 36 F. 2d 876, it was held that the prisoner was entitled to discharge under the

writ of habeas corpus, although restrained by a court-martial decree, where it appeared that the draft board did not comply with the Regulations in classifying him as liable for induction. In the *Ver Mehren* case, supra, "The court thus went behind the court-martial back to the Board, and having found that the Board had improperly inducted him, wiped out the court-martial conviction entirely. In other words, after the petitioner had actually been convicted by court-martial, the court proceeded to review, not his conviction, but the legality of the action of the Selective Service Board, in inducting him, in the first instance."—Ex parte *Stewart,* 47 F. Supp. 410.

In the habeas corpus proceedings instituted by petitioner it was the duty of the court to inquire into the want of authority of the draft boards to set in motion the delinquency proceedings under the Act. If they had no jurisdiction then the convicting court had no jurisdiction. Their action in excess of their authority by ordering a minister of religion to do training and service vitiated the subsequent proceedings resulting in the imprisonment of petitioner. The respondent acquired custody over petitioner by virtue of the Act and the Regulations. So also, under the Act, a prison keeper for the armed forces acquires jurisdiction over an inductee who defies the orders of the military authority. It is the administrative agency created by the Act and functioning under the Regulations which sets in motion the chain of events that results in the imprisonment of the minister of religion whose claim for exemption has been ignored. In either case the want of authority on the part of the agency defeats the claims of the prison keeper to custody of the prisoner.

It is said by Judge Yankwich in *Ex parte Stewart,* 47 F. Supp. 410, that there is a "need for a competent authority to question the possible arbitrariness of a board" and that the need "is clearer, because of the fact that no questioning of the action of the Board is allowed in a prosecution

resulting from disobedience of any of the orders issued by the Board. Were it otherwise, we should have an instance, —which our law abhors,—of finality of administrative action which might leave a person at the mercy or caprice of a lay board, without the power to review arbitrariness, abuses of authority or even lack of jurisdiction. Such a situation is inconsistent with the doctrine of limited sovereignty, which is at the basis of our constitutional structure, and which postulates the existence in the individual of certain rights which he can assert against the sovereign power itself. And, perhaps the most fundamental of these rights is the right of freedom of person, of which the individual cannot be deprived, even in wartime, except through machinery which guarantees the fundamentals of due process. (See Yankwich, *The Constitution and the Future,* Ch. III) . . .

"Suppose he stands convicted. Would he be in a better position to raise the question whether he was legally inducted by suing out a writ against the warden of the penitentiary? Most certainly not. Then, why should he wait? The only real question here is: Is the petitioner being deprived of his liberty by virtue of the action of the board? The answer is: Yes, because he has been arrested for failure to obey the order of the board. And he does not have to wait until he has been convicted to challenge that order. *One may raise the question of due process after conviction.* But a person need not wait until then." (Yankwich, J., in *Ex parte Stewart,* 47 F. Supp. 410) (Italics added)

"In other words, my view is that, if an inductee is restrained of his liberty, in consequence of what he alleges to be the arbitrary action of a Selective Service Board, no matter at what state he is restrained, he may, by writ of habeas corpus, question whether there was evidence to sustain the action of the board. He does not have to wait until he is inducted, and direct his writ to the Commanding

Officer. Nor does he have to risk conviction, desertion or court-martial." (*Ex parte Stewart,* 47 F. Supp. 410, at page 414.) See also the opinion of the district court in *Goodwin* v. *Rowe,* 49 F. Supp. 703.*

The Government concedes that if petitioner had submitted to induction he could have obtained judicial review of his claim for exemption and the illegal action of the administrative agency in rejecting it. Even if he defied the military authority and was sentenced to prison by court-martial he still could challenge the authority of the administrative agency and show the illegality of the order to submit to induction. Indeed it has been held that if he submitted to army routine voluntarily after induction he would have waived his right to review by habeas corpus. (*Mayborn* v. *Heflebower,* CCA-5, 145 F. 2d 864, certiorari denied 65 S. Ct. 1087) *A fortiori,* if defiance of the military authority after induction does not preclude judicial review by writ of habeas corpus, then defiance of the administrative agency by refusing to submit to induction does not preclude similar judicial review by writ of habeas corpus in behalf of one imprisoned under the criminal sanctions clause of the Act for such refusal to submit to induction. The indictment and judicial proceedings thereunder have no stronger armor to resist the writ of habeas corpus than do the court-martial proceedings. The writ penetrates both to reach the vulnerable arbitrary order of the administrative agency that precipitated the attack against the prisoner. The writ of habeas corpus should have been granted and the petitioner discharged. If it is not made available to selectees under such circumstances then the people shall be left at the mercy of administrative agencies for granting their liberty. In such event the courts will have been made impotent and to stand as empty shells and monuments of a more liberal and enlightened age.

*But see *Biron* v. *Collins* (CCA-5) 145 F. 2d 758 reversing *Collins* v. *Biron,* 56 F. Supp. 357.

Conclusion

This Court should exercise its discretionary jurisdiction and grant the writ of certiorari prayed for in the petition, and the judgment of the court below should be reversed so as to correct the errors complained of here as committed by the courts below against petitioner and the Constitution of the United States.

HAYDEN C. COVINGTON

Counsel for Petitioner

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 830

ROYAL WAYNE REA, PETITIONER

v.

A. MCDONALD, WARDEN OF THE FEDERAL CORRECTIONAL INSTITUTION AT TEXARKANA, TEXAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

STATEMENT

It appears from petitioner's petition for a writ of habeas corpus that he is a Jehovah's Witness whose claim to classification as a minister of religion was denied by the selective service boards. He was classified I–A and on June 27, 1944, he was ordered to report for induction. Petitioner reported to the induction station and was found acceptable for military service. He refused, however, to submit to induction. (R. 3–6.)

Petitioner was thereafter indicted in the United States District Court for the Western District of

Oklahoma in one count charging that he willfully refused to submit to induction, in violation of Section 11 of the Selective Training and Service Act (R. 17–19). At his trial he offered in evidence his draft board file and oral testimony to the effect that he was a minister of religion. The trial court rejected the offers and thereafter instructed the jury that petitioner's selective service classification was not open to challenge in the criminal prosecution. (R. 10–11.) Petitioner was convicted and on September 30, 1944, he was sentenced to imprisonment for three years (R. 12). On the same day, he filed a notice of appeal to the United States Circuit Court of Appeals for the Tenth Circuit (R. 12). He failed, however, to cause the record of the trial to be settled and he failed to file an assignment of errors or a bill of exceptions (R. 12). On January 6, 1945, the United States Attorney moved to dismiss the appeal for lack of prosecution and on January 10, 1945, the motion was granted and the appeal was dismissed (R. 12).

On March 27, 1945, petitioner filed a petition (R. 1–15) for a writ of habeas corpus in the United States District Court for the Eastern District of Texas, in which he alleged the foregoing facts and that he was illegally imprisoned by respondent. The petition alleged that there is no evidence to support the selective service boards' denial of his claim to exemption from military

service as a minister of religion (R. 8–9); that the boards had discriminated against him in favor of clergymen of other denominations (R. 9–10); that he was not permitted fully to present his evidence to the local board (R. 4–5); that the order to report for induction was void and the criminal prosecution therefore "illegal, a nullity and void" (R. 2–3, 13); and that "the judgment and commitment are void because upon the trial petitioner was denied the right of trial by jury and his right to prove any substantial defense to the indictment," in violation of his constitutional rights (R. 3).

The district court entered an order on March 27, 1945, denying the petition without granting petitioner a hearing or requiring an answer from respondent. The order (R. 19–20) recites that the petition was denied "for the reason that it is being attempted to be used for the purpose of an appeal and to re-try the issues of fact and law which were tried by the United States District Court in Oklahoma."

Upon appeal to the Circuit Court of Appeals for the Fifth Circuit the order of the district court was affirmed (R. 28). In an opinion by Judge Sibley (R. 25–27), the court held that the rulings of the trial court refusing to permit petitioner to challenge the validity of the induction order in his criminal trial, if erroneous, were reviewable only by appeal and that habeas corpus "is

not a remedy for errors committed in the trial" (R. 26). In respect of petitioner's contention that the induction order was void and that the convicting court therefore had no jurisdiction to punish disobedience of such an order, the court held, relying on the then accepted meaning of *Falbo* v. *United States,* 320 U. S. 549, that "the impropriety of the Board's order, as touching such an exemption as this, cannot be made a defense to such a prosecution" and "much less can it avail to deliver him from imprisonment under a conviction, for then the detention is under the court's sentence and not under the Board's order" (R. 27).

DISCUSSION

1. To the extent that the petition for a writ of habeas corpus is predicated on the theory that the convicting court erred in rejecting petitioner's evidence calculated to show invalidity in the induction order and in instructing the jury that it could not consider the propriety of petitioner's selective service classification, we agree with both courts below that petitioner ought not to be permitted to use the habeas corpus procedure to inquire into the very same questions which were open to him on his abandoned appeal from the conviction just a few months earlier. See *Bowen* v. *Johnston,* 306 U. S. 19, 23–27; *Adams* v. *United States ex rel. McCann,* 317 U. S. 269, 274. There can be no question that upon the face of

the record in the convicting court the indictment charged an offense cognizable by that court and that the court had jurisdiction of petitioner. Likewise it is plain that the asserted errors complained of by petitioner, while of a serious character, were shown by the record of the criminal trial and would have been open for consideration by the Circuit Court of Appeals for the Tenth Circuit on petitioner's appeal if he had perfected it and by this Court on certiorari, if necessary.[1] Thus, in a very real sense, petitioner seeks to use the writ of habeas corpus as a substitute for the appeal which he failed to prosecute to a final conclusion.

We recognize that the rule against permitting the writ of habeas corpus to do service for an appeal "is not one defining power but one which relates to an appropriate exercise of power." *Bowen* v. *Johnston,* 306 U. S. 19, 27. But in this case petitioner points to nothing which justifies a departure from the ordinary rule. It appears from the petition for a writ of habeas corpus that petitioner was represented by counsel at the

[1] In this respect the case is unlike the line of cases illustrated by *Johnson* v. *Zerbst*, 304 U. S. 458, in which the question raised in the habeas corpus proceeding was one which was *dehors* the record in the criminal case and, therefore, presumably was not open to a direct attack by appeal. That an appeal would have afforded petitioner full opportunity to challenge the rulings and instructions of the trial court is illustrated by *Estep* v. *United States*, Nos. 66 and 292, at the present term of this Court, decided February 4, 1946, and the numerous lower federal court decisions cited in the opinions in that case.

criminal trial; that he filed a notice of appeal; that he was allowed almost three months to file a bill of exceptions and assignment of errors; that none was ever filed; and that the appeal was thereafter dismissed by the circuit court of appeals for lack of prosecution, apparently upon a showing that petitioner was not prepared to go forward with the appeal. While petitioner alleges that he was without funds at the time of his appeal (R. 12), there is no suggestion that he or his counsel were unfamiliar with the Act of July 20, 1892, as amended (28 U. S. C. 832), which permits an indigent defendant to proceed in forma pauperis or that he was denied leave to proceed in forma pauperis on the appeal. Petitioner had ample opportunity to challenge the alleged trial errors and he failed to avail himself of that opportunity. That failure, in our view, furnishes no basis for, in effect, taking a second appeal by resorting to habeas corpus.

2. The second aspect of petitioner's contention—that if he was illegally classified the induction order was void and the entire judicial proceeding was likewise void—presents a question which must be examined in the light of the opinion in *Estep* v. *United States,* Nos. 66 and 292, this Term, decided February 4, 1946. The decision of the circuit court of appeals on this question (R. 27) was founded, in part, on the assumption that illegality in a selective service classification is no defense to a criminal prosecution for failing to submit

to induction. Shortly after the decision below, this Court held in the *Estep* case that a defendant in such a prosecution is entitled to show as a defense to the indictment that he was illegally classified. In the course of its opinion, this Court said (slip opinion, pp. 6–8) that "it would seem" that even if the defense were not available in the criminal trial, the way would be open "to challenge the jurisdiction of the local board after conviction by habeas corpus," because the order of the local board was "lawless and beyond its jurisdiction." In discussing the question of the availability of habeas corpus to review the legality of the selective service classification the Court, of course, was not confronted with the factual picture presented by this case. So far as appears from the opinion, the Court did not intend to depart from the established principle of habeas corpus law (see *supra,* pp. 4–6) that a court may, in appropriate circumstances, refuse to convert the writ of habeas corpus into an appeal. As we have shown, the decisions of both courts below were predicated, at least in part, upon this principle. If petitioner had pursued his appellate remedies he would have obtained full review of the very same contentions which he now urges on habeas corpus. For this reason we think that the petition for a writ of certiorari should be denied.

If, however, the Court intended in the *Estep* decision that every registrant who was convicted for failing to submit to induction may test the

legality of his selective service classification by habeas corpus, even though he failed to avail himself of his appellate remedies, then, of course, petitioner is entitled to a hearing and an opportunity to demonstrate that in classifying him the selective service board which finally classified him (*Bowles* v. *United States,* 319 U. S. 33) acted without the authority of the Selective Training and Service Act or the Selective Service Regulations. If the Court intended this, we suggest that the case might well be disposed of in this Court without further briefs or argument by granting the writ of certiorari and reversing the judgment below with instructions that respondent be given an opportunity to answer the petition for a writ of habeas corpus and that such further proceedings shall be conducted as may be proper with respect to the issues raised by the pleadings.

Respectfully submitted.

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